

Assembly Bill No. 1438

Passed the Assembly September 9, 2003

Chief Clerk of the Assembly

Passed the Senate September 4, 2003

Secretary of the Senate

This bill was received by the Governor this _____ day of
_____, 2003, at _____ o'clock __M.

Private Secretary of the Governor

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CHAPTER _____

An act to add Section 1536.5 to the Penal Code, relating to business records.

LEGISLATIVE COUNSEL'S DIGEST

AB 1438, Longville. Seizure of business records.

Existing law authorizes the seizure of business records by a governmental agency pursuant to a search warrant supported by probable cause to believe that the records constitute evidence of the commission of a crime. The court is authorized to order the seized property, including business records, returned upon a motion made on specified grounds, including the grounds that the property taken is not the same as that described in the warrant, the warrant was not supported by probable cause, the warrant or its execution violated state or federal constitutional standards, or the property has not been offered or will not be offered as evidence against the defendant.

This bill would provide a procedure for an entity whose business records have been seized by a government agency, to demand that agency provide to it, within a 5-business day period, copies of the business records or access to the original records so that the entity can make copies of the records. The demand for the records would have to be supported by a declaration, under penalty of perjury, that denial of access to the records or copies of the records would either unduly interfere with the entity's ability to conduct its regular course of business or obstruct the entity from fulfilling an affirmative obligation that it has under the law. The government agency would be authorized to refuse to produce copies of the records or deny access to the records if it rebutted this declaration, or on the grounds that possession of the records by the entity would pose a significant risk of ongoing criminal activity, or would impede or interrupt the investigation. This bill would specify procedures relating to government agency refusals to copy or provide access to records, including in camera hearings in specified circumstances.

By expanding the crime of perjury, requiring the expenditure of local enforcement resources, and by increasing the duties of local officials, this bill would impose a state-mandated local program.



The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement, including the creation of a State Mandates Claims Fund to pay the costs of mandates that do not exceed \$1,000,000 statewide and other procedures for claims whose statewide costs exceed \$1,000,000.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

SECTION 1. Section 1536.5 is added to the Penal Code, to read:

1536.5. (a) If a government agency seizes business records from an entity pursuant to a search warrant, the entity from which the records were seized may file a demand on that government agency to produce copies of the business records that have been seized. The demand for production of copies of business records shall be supported by a declaration, made under penalty of perjury, that denial of access to the records in question will either unduly interfere with the entity's ability to conduct its regular course of business or obstruct the entity from fulfilling an affirmative obligation that it has under the law. This declaration shall suffice if it makes a prima case that specific business activities or specific legal obligations faced by the entity would be impaired or impeded by the ongoing loss of records.

(b) (1) Except as provided in paragraph (2), when a government agency seizes business records from an entity and is subsequently served with a demand for copies of those business records pursuant to subdivision (a), the government agency in possession of those records shall make copies of those records available to the entity within five business days of the service of the demand to produce copies of the records.



(2) In the alternative, the agency in possession of the original records, may in its discretion, make the original records reasonably available to the entity within five business days following the service of the demand to produce records, and allow the entity reasonable time to copy the records.

(3) No agency shall be required to make records available at times other than normal business hours, except where the agency's normal business hours would delay production of the required copies beyond five business days following the service of the demand to produce records.

(4) If data is recorded in a tangible medium, copies of the data may be provided in that same medium, or any other medium of which the entity may make reasonable use. If the data is stored electronically, electromagnetically, or photo-optically, the entity may obtain either a copy made by the same process in which the data is stored, or in the alternative, and at the entity's sole discretion, by any other tangible medium through which the entity may make reasonable use of the data.

(5) A government agency granting the entity access to the original records for the purpose of making copies of the records, may take reasonable steps to insure the integrity and chain of custody of the business records.

(6) If the seized records are too voluminous to be copied in the time period required by subdivision (a), the government agency that seized the records may file a written motion with the court for additional time to make the copies. This motion shall be made within five-business days of the service of the demand for the records. An extension of time under this paragraph shall not be granted unless the agency establishes that producing copies of the records within the five business day time period, would create a hardship on the agency. If the court grants the motion, it shall make an order designating a timeframe for the duplication and return of the business records, deferring to the entity the priority of the records to be duplicated and returned first.

(c) If a court finds that a declaration made by an entity as provided in subdivision (a) is adequate to establish the specified prima facie case, a government agency may refuse to produce copies of the business records or to grant access to the original records only under the following circumstances:



(1) If the government agency proves by a preponderance of the evidence that denial of access to the business records or copies of the business records will not unduly interfere with the entity's ability to conduct its regular course of business or obstruct the entity from fulfilling an affirmative obligation that it has under the law.

(2) If the government agency proves by a preponderance of the evidence that possession of the business records by the entity will pose a significant risk of ongoing criminal activity.

(d) A government agency that desires not to produce copies of, or grant access to, seized business records shall file a motion with the court requesting an order denying the entity copies of and access to the records. A motion under this paragraph shall be in writing, and filed and served upon the entity prior to the expiration of five business days following the service of the demand to produce records specified in subdivision (a), or as soon as reasonably possible after discovery of the risk of harm.

(e) A hearing on a motion under subdivision (d) shall be held within two court days of the filing of the motion, except upon agreement of the parties.

(f) (1) Upon receipt of the demand for copies of records, the government agency may file a request in writing, served upon the requesting entity, that any showings of why the material should not be copied and released occur in an ex parte, in camera hearing. If the government agency alleges in its request for an in camera hearing that the demanding entity is a target of the investigation resulting in the seizure of records, the court shall hold this hearing outside of the presence of the defendant and his or her counsel. If the government agency does not allege in its request for an in camera hearing that the demanding entity is a target of the investigation resulting in the seizure of records, the court shall hold the hearing in camera only upon a particular factual showing by the government agency in its pleadings that a hearing in open court would impede or interrupt an ongoing criminal investigation.

(2) At the in camera hearing, any evidence that the government agency may offer that the release of the material would pose a significant risk of ongoing criminal activity, impede or interrupt an ongoing criminal investigation, or both, shall be offered under



oath. A reporter shall be present at the in camera hearing to transcribe the entirety of the proceedings.

(3) Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents, unless a court determines that the failure to disclose the contents of the hearing would deprive the defendant of a fair trial.

(4) Following the conclusion of the in camera hearing, the court shall make its ruling in open court, after notice to the demanding entity.

(g) The costs of producing copies of business records under this section shall be borne by the entity requesting copies of the records. A government agency may charge the entity only for the actual costs of copying and producing the business records.

(h) For purposes of this section, the following terms are defined as follows:

(1) “Seize” means obtaining actual possession of any property alleged by the entity to contain business records.

(2) “Business” means an entity, sole proprietorship, partnership, or corporation operating legally in the State of California, that sells, leases, distributes, creates, or otherwise offers products or services to customers.

(3) “Business records” means computer data, data compilations, accounts, books, reports, contracts, correspondence, inventories, lists, personnel files, payrolls, vendor and client lists, documents, or papers of the person or business normally used in the regular course of business, or any other material item of business recordkeeping that may become technologically feasible in the future.

SEC. 2. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution for certain costs that may be incurred by a local agency or school district because in that regard this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.



However, notwithstanding Section 17610 of the Government Code, if the Commission on State Mandates determines that this act contains other costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code. If the statewide cost of the claim for reimbursement does not exceed one million dollars (\$1,000,000), reimbursement shall be made from the State Mandates Claims Fund.



Approved _____, 2003

Governor

